SUBJECT INDEX

PAGE

Introduction 1

I.

The opinion of this court in Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084, is an effective answer to petitioner's contention, under its Point I, that the judgment of the Supreme Court of California herein deprived petitioner of due process 5

Cases cited by petitioner 12

II.

The legal questions presented by petitioner under its Point II are not federal questions but are questions of state or general law 18

Conclusion 27

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bray v. Superior Court, 92 Cal. App. 428, 268 Pac. 374	5, 17
California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 79 L. Ed. 1356	18
Carter v. Kubler, 320 U. S. 243, 88 L. Ed. 26	12, 14
Connecticut v. Massachusetts, 282 U. S. 660, 75 L. Ed. 602	18
Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598	12
Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720	18, 19
Devine v. Los Angeles, 202 U. S. 313, 50 L. Ed. 1046	18, 19
Fervel v. Fervel, 23 Cal. 2d 431, 144 P. 2d 592	15
Fleming v. Bennett, 18 Cal. 2d 518, 116 P. 2d 442	5, 15
Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487	11, 18, 21
Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748	23
Humboldt Land & Cattle Co. v. Allen, 14 F. 2d 650	17
Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956	18
Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766	21
Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369	22
Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736	18
Miller & Lux v. Enterprise Canal etc. Co., 169 Cal. 415, 147 Pac. 567	24
Morgan v. United States, 298 U. S. 469, 80 L. Ed. 1288, 304 U. S. 1, 82 L. Ed. 1129	12, 13
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093	12, 14, 21, 22
O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20, 61 L. Ed. 123	25
Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084	5, 8

PAGE

Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 5
Peoples Gas Co. v. Tyner, 131 Ind. 277 21
Peterson, Walter, In the Matter of, 253 U. S. 300, 64 L. Ed. 919 12
Powhatton Min. Co. v. Ickes, 118 F. 2d 105 12
Railroad Commission v. Rowan et al., 310 U. S. 573, 84 L. Ed. 1368 22
Snake Creek etc. Co. v. Midway, 260 U. S. 596, 67 L. Ed. 423 ..... 18, 20
Telluride v. Rio Grande etc. Co., 187 U. S. 569, 47 L. Ed. 307 ..... 18, 20
United States v. Dillman, 146 F. 2d 572 ..... 12, 15
United States v. Los Angeles and Salt Lake Railway Co., 273 U. S. 299, 71 L. Ed. 651 12
United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136 18
Western Union Tel. Co. v. Industrial Com., 24 Fed. Supp. 370 12
Weyerhauser v. Minnesota, 176 U. S. 550, 44 L. Ed. 583 ..... 18, 20
Wood v. Pendola, 1 Cal. 2d 435, 35 P. 2d 526 5

TEXTBOOKS

16 Corpus Juris Secundum, Sec. 128, p. 331 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 353

California Supreme Court No. L. A. 19610 and L. A. 19186.

CALIFORNIA-MICHIGAN LAND AND WATER COMPANY, a corporation,

Petitioner,

vs.

CITY OF PASADENA, a municipal corporation; CITY OF ALHAMBRA, a municipal corporation; CITY OF MONROVIA, a municipal corporation; CITY OF ARCADIA, a municipal corporation; CITY OF SIERRA MADRE, a municipal corporation; LA CANADA IRRIGATION DISTRICT, SAN GABRIEL COUNTY WATER DISTRICT, LINCOLN AVENUE WATER COMPANY, a corporation; THE LAS FLORES WATER COMPANY, a corporation; RUBIO CANON LAND AND WATER ASSOCIATION, a corporation; VALLEY WATER COMPANY, a corporation; MIRA LOMA MUTUAL WATER COMPANY, a corporation; EL CAMPO MUTUAL WATER COMPANY, a corporation; SUNNY SLOPE WATER COMPANY, a corporation; CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation; CROWN CITY ICE COMPANY, a corporation; ROYAL LAUNDRY & DRY CLEANING COMPANY, a corporation; ERNEST CRAWFORD MAY, as the Executor of the California estate of Charles Heuston Hastings, deceased; A. V. WAGNER, EUGENE E. BEAN, CHESLEY E. OSBORN and KATHLEEN M. OSBORN (substituted in lieu of Dell A. Schweitzer as executor of the estate of Fred M. Wilcox, deceased, and Ernest E. Jones as custodian of the estate of Fred M. Wilcox, deceased); ALICE GRAVES STEWART, KATHARINE GRAVES ARMSTRONG and FRANCIS P. GRAVES, as heirs at law and residuary legatees under the last Will and Testament of Alice H. Graves, deceased (substituted in lieu of Alice H. Graves, deceased); ROSS M. LOCKHART, PASADENA CEMETERY ASSOCIATION, a corporation; ALTADENA GOLF CLUB, a corporation; HENRY E. HUNTINGTON LIBRARY AND ART GALLERY, a corporation; DIVISION OF WATER RESOURCES, DEPARTMENT OF PUBLIC WORKS, STATE OF CALIFORNIA, and said DIVISION OF WATER RESOURCES AS REFEREE; CANYON MUTUAL WATER COMPANY, a corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

The complaint in the present action was filed on September 23, 1937, for the purpose of quieting the title of

plaintiff as against the defendants to divert and use the underground waters in the Raymond Basin Area, and to enjoin each defendant found to own a right to divert water in said basin from taking therefrom in any year water in such volume as, when added to the amount which the other parties should be decreed to be entitled to take, would result in a total annual diversion from said basin in excess of the average annual supply of water thereto.

On February 8, 1939, the Court referred the case to the Division of Water Resources, as referee, for investigation and report upon all of the physical facts involved in the action, under authority contained in Section 24 of the Water Commission Act. [Ex. 1, pp. xxi-xxiii.] On June 21, 1939, the Division filed a preliminary report recommending bringing in additional parties, and on July 13, 1939, the Court issued its order directing that certain additional parties be brought into this action. On June 9, 1939, the Court made its order and instructions to referee wherein it found and ordered "that the issues in the above entitled cause embrace an adjudication of the rights of the defendants *inter se* and the rights of each and every party as against each and every other party." [Ex. 1, pp. xxiv, xxv.]

Regarding the use of engineering data of parties in the instant case, it is noteworthy that the trial court in ordering the reference herein included the following [Ex. 1, p. xxiii]:

> "It is recommended to the parties to this action, that they, severally or jointly, appoint engineers to collaborate with the Division of Water Resources throughout this investigation, and it is recommended to the referee that it seek the advice and counsel of said engineers in the formulation of the program of investigation and in the preparation of the report."

Acting on that recommendation certain of the parties appointed engineering representatives who aided the referee in the preparation of the report. The engineers so acting and the enterprises represented by them are as follows [Tr. pp. 671-672; Ex. 1, p. xxiv]:

"EDWARD R. BOWEN	City of Alhambra
	California Water and Telephone Company
JOHN W. CLAY	City of Alhambra
RAYMOND A. HILL	Flintridge Mutual Water Company
J. Q. JEWETT	Las Flores Water Company
	Lincoln Avenue Water Company
	Rubio Canon Land and Water Association
	Valley Water Company
J. D. MACKERRAS	First Trust and Savings Bank of Pasadena (Altadena Golf Club)
SAMUEL B. MORRIS assisted by MORRIS S. JONES CLAUDE W. SOPP	City of Pasadena
F. A. OLSEN	Sunny Slope Water Company
H. A. PETRIE	San Gabriel County Water District
RALPH SHOEMAKER	City of Arcadia
	City of Sierra Madre
FRANKLIN THOMAS	Robert A. Millikan, *et al.*, Trustees of the Henry E. Huntington Library and Art Gallery"

The referee's report, therefore, is not only the result of investigation and study by a specially trained state division, but also it has had the benefit of the cooperative efforts of the engineers of many of the parties.

Petitioner not only refrained from appointing an engineer as recommended in the order, but also refused to furnish necessary records to the referee. On August 30, 1939, in response to a request therefor by the referee, the court issued an order that petitioner submit and make available to the referee all documentary evidence in its possession bearing upon the issues referred to the referee. [Ex. 1, p. xxxvi.]

On October 14, 1941, the referee transmitted copies of its proposed draft of report as referee to the attorneys of record in this action. On March 15, 1943, the referee formally served its Draft of Report of Referee upon all parties. Objections to the Draft of Report were filed by some of the parties, including the petitioner, who filed *60* specific objections. [Tr. pp. 457-469.] The referee made minor changes in the report pursuant to certain of the objections.

The Report of the Referee was filed in court on July 12, 1943. The Court set May 18, 1944, for the hearing of exceptions to the Report of Referee and the further trial of the case. Although a number of parties filed exceptions to the Report, all of such exceptions were withdrawn at the beginning of the hearing on May 18, 1944, with the exception of those filed by petitioner. There were twelve days of trial in the period May-August, 1944. [Tr. p. 419, fol. 891.] The reporter's transcript of the trial contains *1228* pages, all of which are devoted to the presentation by petitioner of its exceptions (*60* in number) and evidence in connection therewith. We emphasize the point that the entire trial involved the consideration of those exceptions only which were filed by petitioner. The trial was solely for its benefit.

I.

The Opinion of This Court in Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. Ed. 1084, Is an Effective Answer to Petitioner's Contention, Under Its Point I, That the Judgment of the Supreme Court of California Herein Deprived Petitioner of Due Process.

The statutes of the State of California provide two procedures for the adjudication of the relative rights to the water of a common source of supply. In point of time, they are first, the statutory procedure, and second, the reference procedure. The latter is the procedure involved herein.

The statutory procedure in California is the same as that provided in the 1909 Water Code of Oregon, the validity of which was upheld by this Court in *Pacific Live Stock Co. v. Lewis,* 241 U. S. 440, 60 L. Ed. 1084. The constitutionality of this procedure has been upheld by the California courts in *Bray v. Superior Court,* 92 Cal. App. 428, 268 Pac. 374, and *Wood v. Pendola,* 1 Cal. 2d 435, 35 P. 2d 526.

In the *Bray* case the court noted and discussed the similarity of the statutory procedure adopted by California to that of Oregon, involved in the *Pacific Live Stock Co.* case, *supra,* and of other western states.

The constitutionality of the reference procedure has been upheld by the California Supreme Court in *Fleming v. Bennett,* 18 Cal. 2d 518, 116 P. 2d 442, and in the instant case, *Pasadena v. Alhambra,* 33 Cal. 2d 908, 207 P. 2d 17. In opening its opinion in the instant case, the Court said (33 Cal. 2d 916):

"Plaintiff city, the chief producer of water from a 40 square mile alluvial-filled basin of ground water

known as the Raymond Basin Area, instituted this litigation to determine the ground water rights within the area and to enjoin an alleged annual overdraft in order to prevent eventual depletion of the supply. Pursuant to section 24 of the Water Commission Act, which was then in force (Stats. 1913, p. 1012, as amended, Deering's Gen. Laws (1937), Act. 9091; now Wat. Code, §§2000-2050), the trial court referred the matter to the Division of Water Resources of the Department of Public Works for a determination of the facts, and the ensuing report of the division was received in evidence. On the basis of this report all of the nondisclaiming parties, with the exception of the defendant California-Michigan Land and Water Company, a public utility and the sole appellant herein, entered into a stipulation for a judgment allocating the water and restricting total production to the safe annual yield. The court, after hearing evidence presented by appellant in opposition to the report, rendered a judgment substantially enforcing the terms of the stipulation against all parties, including appellant.

"The principal issues presented on this appeal are whether the trial court properly limited the amount of water that appellant may take from the ground in the Raymond Basin Area, and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties. * * *"

Regarding the approval of the reference procedure by the California Supreme Court, it is said in the instant case (33 Cal. 2d. 917, 918):

"Every recent major water law decision of this court has expressly or impliedly approved the reference procedure provided by section 24 and has recommended, in view of the complexity of the factual is-

sues in water cases and the great public interests involved, that the trial courts seek the aid of the expert advice and assistance provided for in that section. (See *Fleming v. Bennett,* 18 Cal. 2d 518, 522 *et seq.* (116 P. 2d 442); *Meridian, Ltd. v. San Francisco,* 13 Cal. 2d 424, 457 (90 P. 2d 537, 91 P. 2d 105); *Rancho Santa Margarita v. Vail,* 11 Cal. 2d 501, 558-559 (81 P. 2d 533); *City of Lodi v. East Bay Mun. Utility Dist.,* 7 Cal. 2d 316, 341 (60 P. 2d 439); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.,* 3 Cal. 2d 489, 575 (45 P. 2d 972, 1014); *Peabody v. City of Vallejo,* 2 Cal. 2d 351, 373-374 (40 P. 2d 486); *Wood v. Pendola,* 1 Cal. 2d 435, 443 (35 P. 2d 526).)

"In sustaining and approving the reference procedure, it was stated in the Fleming case that 'all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24. . . .' (18 Cal. 2d at p. 528.) The opinion did not mention whether section 24 conflicted with article III, section 1, of the Constitution, which provides for the separation of powers, or discuss whether such an order of reference invalidly subjects an executive branch or division and its officers to the control of the judiciary. It was, however, expressly held (18 Cal. 2d at pp. 523-525) that section 24 does not provide for the exercise of judicial power by the division, and implicit in the decision is the conclusion that the separation of governmental powers is observed. (See, also, *Wood v. Pendola,* 1 Cal. 2d 435, 442 (35 P. 2d 526).) In effect section 24 provides that the court may appoint the division to act as an investigator and an expert witness, but there is nothing which authorizes the courts to control or regulate, in any particular, the proper functions of the division or the manner in which, pursuant to legislative mandate, it shall proceed in conducting its ex-

amination and making its report. The Fleming case also expressly held that section 24 is not unconstitutional and void as a special law providing for a variation from the general practice and procedure in the superior court in violation of article IV, section 25, of the Constitution. (18 Cal. 2d at p. 528, cf., Wood v. Pendola, 1 Cal. 2d 435, 442 (35 P. 2d 526).)"

In both its petition and brief, petitioner seems to indicate that the only evidence before the trial court when it acted in this case was the report of the referee and the stipulation for judgment executed by plaintiff and all defendants other than petitioner. It ignores completely the many days of trial given to petitioner (then defendant) by the court in hearing its exceptions to the referee's report. At page 66 of its petition and brief herein, petitioner argues:

". . . In *Fleming v. Bennett* it was held that the Legislature was authorized to permit the filing of the report of a Referee made solely on the basis of private investigation, and to give the report of the Referee the status of *prima facie* evidence, and this on the authority of *Pacific Live Stock Company v. Lewis* (1916), 241 U. S. 440, although the Oregon statute involved in that case required a full and fair hearing, and the report of the Referee was made only after a full and fair hearing in which witnesses were sworn and examined and a record of all the evidence was preserved."

Petitioner clearly misunderstands the character of the report of the State Water Board in the *Pacific Live Stock Co.* case. It also fails to note that appellant in that case entered the same objections to the procedure before the Board that petitioner does here to the referee's report. This

is shown by the following excerpts from the opinion in that case (241 U. S. 451, 60 L. Ed. 1097, 1098):

"As an alternative to its first contention, which we hold untenable, the plaintiff insists that the statute is repugnant to the due process of law clause of the 14th Amendment, first, because it requires a claimant, at his own expense, to assert and prove his claim before the board, and to pay an extortionate fee for having it considered,—all under penalty of forfeiting his claim if he refuses,—notwithstanding the board acts only administratively and its findings and order are not conclusive; second, because it permits the board to accept and act upon the sworn statement of claimants taken *ex parte* and upon the data set forth in the unsworn report of the engineer, without, as is asserted, affording any opportunity for showing their true value, or the want of it, by cross-examination or otherwise; and, third, because it requires that the board's findings and order, although only administrative in character, be followed and given effect in the distribution of the water pending the action of the circuit court upon them.

"A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board, and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report, the board merely paves the way for an adjudication by the court of all the rights involved. As the supreme court of the state has said, the Board's duties are much like those of a referee. (And see Washington *ex rel.* Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 526, 527, 56 L. ed. 863, 868, 869, 32 Sup.

Ct. Rep. 535.) All the evidence laid before it goes before the court, where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable.

* * * * * * * *

". . . And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them, and that, upon the hearing of the contests, full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examination shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all, and is accepted as *prima facie* evidence, but not as conclusive. . . ."

It is noteworthy that the following sentence is used in the first of the above-quoted excerpts:

"As the supreme court of the state has said, the board's duties are much like those of a referee."

Unlike the statutory procedure, there is nothing novel in the referee procedure. In 16 Corpus Juris Secundum Constitutional Law, §128, p. 331, it is said:

> *"Regulating references.* Legislation providing for the trial of causes by auditors and referees and making their findings evidence, without concluding the parties thereby, is within the power of the legislature; but legislation making the findings of such officers conclusive is ordinarily an invasion of the province of the judiciary and unconstitutional, although where the constitution sanctions regulation of the jurisdiction of a court, or the matter is peculiarly one for the legislature, a statute may provide for reference to officials having the same power of determination as the court. . . ."

The following is from a footnote (p. 331):

> *"Reason for rule*
>
> "In such cases there is no interference with the judicial power, since the subordinate officers act under the direction of the courts, which may review and reverse the findings of such officers.—*Janesville Cotton Mfg. Co. v. Ford,* 12 N. W. 377, 55 Wis. 197—12 C. J. p. 828, note 21."

In one of the early cases dealing with the pueblo right of Los Angeles, *Hooker v. Los Angeles,* 188 U. S. 314, 318, 47 L. Ed. 487, it is said:

> "The 14th Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

The power of a court to refer disputed issues in a case to an auditor or referee with power to make findings with respect thereto where such findings are not given conclusive but only *prima facie* effect and the parties are given the opportunity of having their objections thereto heard and considered by the court cannot be doubted. Such practice was approved by this court in the case of *In the Matter of Walter Peterson,* 253 U. S. 300, 64 L. Ed. 919.

Statutes providing for the determination of factual matters by administrative agencies where judicial review thereof is provided do not violate due process.

Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598;

United States v. Los Angeles and Salt Lake Railway Co., 273 U. S. 299, 71 L. Ed. 651.

CASES CITED BY PETITIONER.

The following cases are cited by petitioner in support of its contention that the judgment herein deprived petitioner of due process:

(1, 2) *Morgan v. United States* (1936), 298 U. S. 469, 80 L. Ed. 1288; (1937), 304 U. S. 1, 82 L. Ed. 1129;

(3) *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093;

(4) *Carter v. Kubier,* 320 U. S. 243, 88 L. Ed. 26;

(5) *United States v. Dillman,* 146 F. 2d 572;

(6) *Powhatton Min. Co. v. Ickes,* 118 F. 2d 105;

(7) *Western Union Tel. Co. v. Industrial Com.,* 24 Fed. Supp. 370.

The first *Morgan* case dealt with a rate order of the Secretary of Agriculture under Packers and Stockyard

Act. The full hearing required by the statute was not given. The Court said (p. 477):

> ". . . If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied. . . ."

The Court further said (p. 478) that it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented, although it could not say that that particular type of procedure was essential to the validity of the hearing.

It must be emphasized that in the instant case a copy of the referee's report was given to each of the parties, including petitioner and pursuant to statute each party was given a fixed time to file objections thereto. Petitioner filed 60 objections to the referee's report and had a full judicial hearing thereon.

In the second *Morgan* case, 304 U. S. 1, 82 L. Ed. 1129, no opportunity had been afforded appellants for the examination of the findings, prepared by the Bureau of Animal Industry, until they were served with the order. This Court was so impressed by the absence of due process in this second *Morgan* case that it said (pp. 19, 20):

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements

of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The *Ohio Bell Tel. Co.* case, 301 U. S. 292, 81 L. Ed. 1093, is sufficiently explained by the tenth headnote as follows:

"10. Where the findings of a state Utilities Commission in a proceeding to determine the reasonableness of rates as to the value of the property of a telephone company at the periods in question are not supported by evidence, the court has no occasion to determine the propriety of the method of allocation followed in ordering a refund of rates collected in excess of those held reasonable, or of the commission's treatment of going concern value and depreciation reserve."

In *Carter v. Kubler,* 320 U. S. 243, in fixing the valuation of a farm in a proceeding under the farmer-debtor provisions of the Bankruptcy Act, the Commissioner based

his conclusion as to value on his own personal investigation. There was no opportunity given to combat the personal views of the Commissioner thus obtained.

In *U. S. v. Dillman,* 146 F. 2d 572, dealing with the value of land condemned by the Government, the trial judge viewed the land and was given information by a police sergeant. Neither the thoughts of the trial judge nor the information given to him by the police sergeant appeared in the record and, therefore, could not be combatted.

In *Fervel v. Fervel,* 23 Cal. 2d 431, 144 P. 2d 592, it was held that it is not the province of investigators to make a private factual report or recommendation to the judge, or any recommendation independent of the evidence upon which it is based.

It is clear from the above comments upon the cases cited by petitioner that no one of them presents procedural facts at all similar to those involved herein. We have elsewhere stated the number of objections filed by the present petitioner to the report of the referee and the number of exceptions to such report filed in and heard by the trial court. The procedure of the instant case in its liberality in affording opportunity to present objections and exceptions, and evidence and arguments thereon, is in marked contrast with the total absence of such opportunity presented in the cases relied upon by petitioner. On this point the words of the California Supreme Court in *Fleming v. Bennett,* 18 Cal. 2d 518, 527 (the first California case up-

holding the constitutionality of the reference procedure) are appropriate:

> ". . . (4a) The appellants do not question the power of the legislature to prescribe that the report of the referee shall be *prima facie* evidence of the facts reported. Indeed, that power may not be denied. (See *People v. Buckley,* 143 Cal. 375, 393 (77 Pac. 169); *Miller & Lux, Inc., v. Secara,* 193 Cal. 755, 766 (227 Pac. 171); *Pacific Live Stock Co. v. Lewis,* 241 U. S. 440 (36 Sup. Ct. 637, 60 L. Ed. 1084).) The parties were not deprived of any constitutional right. They were afforded full opportunity to be heard in opposition to the report as evidence, and to introduce evidence contrary to the facts appearing therein. Constitutional mandates are observed where such facts are not made incontrovertible and opportunity is given to refute them in court. (*Pacific Live Stock Co. v. Lewis, supra;* see also *Heiner v. Donnan,* 285 U. S. 312 (52 Sup. Ct. 358, 76 L. Ed. 772).) . . ."

Petitioner asserts (Petition p. 34) that the parties did not disclose their claims to petitioner prior to trial, and therefore it was impossible for petitioner to defend against the claims. The record, of course, shows the falsity of this contention. The claims of the various parties were set forth in their pleadings on file. True, the answers of the other defendants were not served upon petitioner, but petitioner could have easily ascertained the nature and extent of the claims by inspecting the pleadings on file. Moreover, long prior to the trial the parties served petitioner with copies of the agreement and judgment which they

sought to have the court make effective as among themselves prior to the time of trial and gave notice to petitioner of the time and place when that application would be made to the court. [Tr. pp. 477-478.] The proposed judgment and agreement set forth fully the concept of these parties as to the nature and character of the basin, the basis upon which the rights of each party should be determined, the amount of the water these parties thought petitioner was entitled to under the facts and law applicable as well as the amount each of the stipulating parties considered he was entitled to. [Tr. pp. 482-506.] Thus, petitioner had full and complete knowledge of the claims of the parties not only with respect to the factual situation, but also with respect to the legal principles they would seek to have applied in the determination of the case.

Due process does not require that pleadings and the claims of the various parties to an adjudication suit be personally served upon each of the other parties. It is sufficient if the nature and extent thereof can be ascertained by the parties from an inspection of the record in the case (*Humboldt Land & Cattle Co. v. Allen,* 14 F. 2d 650). Such was the established law in California at the time of the commencement of the instant action (*Bray v. Superior Court, supra*).

II.

The Legal Questions Presented by Petitioner Under Its Point II Are Not Federal Questions but Are Questions of State or General Law.

Questions of state or general law are not federal questions.

United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136;

Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956;

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 79 L. Ed. 1356;

Connecticut v. Mass., 282 U. S. 660, 75 L. Ed. 602;

Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720;

Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487;

Devine v. Los Angeles, 202 U. S. 313, 337, 50 L. Ed. 1046, 1054;

Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736;

Telluride v. Rio Grande etc. Co., 187 U. S. 569, 47 L. Ed. 307;

Snake Creek etc. Co. v. Midway, 260 U. S. 596, 67 L. Ed. 423;

Weyerhaueser v. Minn., 176 U. S. 550, 44 L. Ed. 583.

In the first four cases cited above this Court has recognized the right of each state to adopt its own system of water law. This is exemplified by the following excerpt from *Kansas v. Colorado*, 206 U. S. 93, 94:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this

> case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. * * * It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control."

The four cases cited above in which Los Angeles was defendant in error dealt with the *pueblo right* of that City to the water of Los Angeles River. This pueblo right had come down from the Mexican regime in California and was considered paramount to the riparian rights of upper owners on the river. It was claimed by the riparian owners that treaties with Mexico were involved and that, therefore, a federal question was presented. The rule adopted by this Court in these four cases is concisely stated in the headnote to the opinion in the *Crystal Springs L. & W. Co.* case, 177 U. S. 169, as follows:

> "A suit to establish water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of a treaty with Mexico, is held to involve no Federal question for the purpose of giving jurisdiction to the Federal courts."

In the third of the pueblo-right cases cited above, *Devine v. Los Angeles,* 202 U. S. 313, 337, it is said:

> "In truth, the questions as to the nature and extent of complainants' title or rights, as put forward in the bill, are not Federal questions, but questions of state or general law.
>
> "In *Hooker v. Los Angeles, supra,* it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and

in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States and so reviewable here. But this court held otherwise, and we said:

" 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco v. Scott,* 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works v. Davis,* 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact. . . ."

In *Telluride P. T. Co. v. Rio Grande W. R. Co.,* 187 U. S. 569, the second headnote is:

"2. Findings of fact or questions of local law upon which depends a party's right, under U. S. Rev. Stat. §2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court."

In *Snake Creek M. & T. Co. v. Midway Irrig. Co.,* 260 U. S. 596, 599, it is said:

"The parties, while agreeing that the Utah law is controlling, differ as to what the law is."

In *Weyerhaueser v. Minn.,* 176 U. S. 550, 559, it is said:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no Federal question."

In the cases above considered it is shown that even though the water rights presently involved may have come down from the Mexican government or may have been acquired on public lands, no Federal question was involved. In the instant case the matter of pueblo rights, or riparian rights, or appropriative rights to waters of a stream, are not present. The title to percolating water is alone involved. Until *Katz v. Walkinshaw,* 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903), the owner of land in California owned the percolating water contained therein. The *Katz* case established the doctrine that the owner of land has a correlative right to use the underlying percolating water with other owners of land similarly situated. The source of the title to percolating waters under either the old or the new doctrine was the ownership of the land. Under the authorities above cited this ownership does not present a Federal question. In the excerpt from *Hooker v. Los Angeles* hereinabove quoted (p. 20) it is stated:

> "Obviously, the question as to the title or right of the plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law upon which the decision of the state court was final."

Cases dealing with oil and gas often speak of the analogy between them and percolating water. In *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 207, 44 L. Ed. 729, this Court in quoting from *Peoples Gas Co. v. Tyner,* 131 Ind. 277, 281, said:

> " 'Water, petroleum, oil and gas are generally classed by themselves as minerals possessing in some degree a kindred nature. * * * Like water it is not the subject of property except while in actual occu-

pancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The opinion in the *Ohio Oil Co.* case closes as follows (177 U. S. 211, 212):

"In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

In *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 81, 55 L. Ed. 369, it is said:

"Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be *prima facie* evidence of another fact."

In *R. R. Com. v. Rowan et al.,* 310 U. S. 573, 580, 581, 84 L. Ed. 1368, dealing with the proration of oil production, it is said:

". . . But such cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the

underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

It is therefore unnecessary to review the many contentions made by petitioner with respect to the facts or the weight or sufficiency of the evidence to justify the findings of the trial court with respect to the facts, nor to enter into a discussion of the conclusions of the District Court of Appeal in so far as they are contrary to those reached by the trial court and by the Supreme Court.

It is apparently asserted by petitioner that the decision of the California Supreme Court reverses prior decisions of that court with respect to the application of the statute of limitations and the doctrine of notice. Petitioner points to no prior decision of any court of California holding that the lowering of the water table is not notice of a dimunition in the supply of water or that such dimunition in the supply is not notice of an adverse and hostile taking of water from the common supply, nor does petitioner cite any case decided by the California courts holding that the taking of water from a depleted basin is not hostile to the taking of others from the same source. The reason for this failure is apparent as the rule in California ever since the decision in 1909 in the case of *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. 748, has been that a diminution in the amount of water at a party's point of diversion (abundantly evidenced by the substantial and progressive

lowering of the water levels at petitioner's point of diversion) puts that party on notice of the invasion of his right and starts the prescriptive period. There the court stated (p. 631):

> "There is no foundation for the proposition that the statute of limitations would not begin to run in favor of Currier, with respect to his right to maintain wells, until the extraction of water by his wells had begun to diminish the flow at the plaintiff's dam. The evidence shows that the effect was perceptible at the dam immediately and that the plaintiff had knowledge of the flow from the wells and the use thereof by Currier from the beginning. This was sufficient to charge her with notice that the tendency of the diversion of the flow at those wells would be to reduce the amount in the stream below and to start the statute of limitations running."

The law was likewise well settled that two uses made simultaneously from a basin are necessarily inconsistent and antagonistic. In the case of *Miller & Lux v. Enterprise Canal Etc. Co.*, 169 Cal. 415, 147 Pac. 567, the court stated (p. 433) with respect to a basin of water created by a dam:

> ". . . The opening of the headgate at such times would inevitably divert into the canal water that would otherwise pass into the slough. This would be the result alike when water stands at the natural river level, and when it is backed up the slough by the dam. The two uses, if made simultaneously, would necessarily be inconsistent and antagonistic. For these reasons, the finding cannot be true that the natural flow of the water from the river into the slough is not and never has been impeded by the operation of said canal."

The rule, of course, is well settled that before a party can complain that his property is taken without due process of law because of the construction placed upon a state statute of limitations by a state court, he must show that the prior decisions construing the statute were contrary to the construction complained of and the prior decisions had become a rule of property. In the case of *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20, 26, 27, 61 L. Ed. 123, this court said:

> ". . . The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise, and when it is too late for him to act on the construction and save his rights. That is all that the plaintiff has to complain of. There was no different construction of the statute by the court before the limitation had run, that might have lulled him to repose.
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> * * * * * * * *
>
> "It is suggested that the cases cited established a rule of property, and that any departure from it violated the plaintiff's rights under the 14th Amendment. But we already have said that the cases do not establish the rule supposed, and if they did, something more would be necessary before the plaintiff could come to this court. *Sauer v. New York*, 206 U. S. 536, 547, 548, 51 L. ed. 1176, 1182, 27 Sup. Ct. Rep. 686; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678."

That the case, even under petitioner's view, involves no more than the application of existing statutes to a new situation rather than the overruling of prior decisions applying the statute to the same situation, is apparent from

petitioner's statement on page 81 that "until the instant decision there had been no such thing known to the law as 'mutual prescription.'" Prior decisions had not involved an *inter se* determination of conflicting adverse claims to a common supply in a basin. (33 Cal. 2d p. 931.) Of course, under the cited case, this involves no question of due process.

However, as we have noted, the application of the doctrine of prescription and of notice made by the Supreme Court of the State of California in the instant case is in harmony with and not contrary to its prior decisions, and petitioner has pointed to no prior decision of the California courts sustaining its position. The application of the prior rules well established by the California courts prior to the decision in the instant case and the commencement of this action, together with petitioner's stipulation that the taking of water by each party was under a claim of right which was asserted to be and was adverse to each and all other parties, sufficiently disposes of petitioner's contentions and fully justifies the conclusion of the court as set forth in its opinion (33 Cal. 2d pp. 922, 928-932). As noted by the court the stipulation covered all elements of prescription except the period covered by the adverse user and the nature and extent of the user. It found sufficient evidence to support the trial court's finding with respect to these elements and held that under state law the facts justified the application of the doctrine of notice. Thus no federal question is presented.

Conclusion.

For the reasons herein set forth we respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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